

UNAPPROVED AND SUBJECT TO CHANGE
CALIFORNIA FAIR POLITICAL PRACTICES COMMISSION
MINUTES OF THE MEETING, Public Session

October 11, 2001

Call to order: Chairman Karen Getman called the monthly meeting of the Fair Political Practices Commission (FPPC) to order at 9:55 a.m., at 428 J Street, Eighth Floor, Sacramento, California. In addition to Chairman Getman, Commissioners Sheridan Downey, Thomas Knox and Gordana Swanson were present.

Item #1. Approval of the Minutes of the September 10, 2001 Commission Meeting.

The minutes of the September 10, 2001 Commission meeting were distributed to the Commission and made available to the public. Commissioner Swanson moved that the minutes be approved. Commissioner Knox seconded the motion. There being no objection, the motion carried.

Item #2. Public Comment.

Chairman Getman introduced Scott Burritt, an Executive Fellow assigned to the Commission for a year by the Executive Fellows Program, and Amanda Stelmack, a new attorney with the Commission's Enforcement Division.

Chairman Getman announced that Investigator Bill Motmans of the Enforcement Division was leaving the staff. She listed his accomplishments with the Commission and expressed deep regret that he would be going to another state agency. She noted that the Commission is currently unable to pay investigators and accounting specialists what they deserve to be paid, and they receive less than investigators and accounting specialists in other state agencies because of a fluke in the civil service pay system. She noted that staff is trying to alleviate that problem, but that the Commission continues to lose qualified staff in the meantime.

Caren Daniels-Meade, from the Secretary of State's Office, gave a brief overview of the October 10 filings. She explained that there were 811 campaign related filings during the month of October, 2001. On Wednesday, October 10, there were 404 filings, 320 of which were the Form 460. There were 608 Form 460s filed during October.

Item #3. Proposition 34 Regulations: Pre-notice Discussion of Regulatory Action Regarding Section 85200 ("One-Bank Account" Rule) and Section 85317 (Carry Over of Contributions); Proposed Regulations 18520, 18521, 18523, 18523.1, and 18537.1.

Assistant General Counsel John Wallace explained that the Commission was being presented two major decision points. Section 85317 permits contributions to be carried over without limits and without attribution to specific contributors. Proposition 34 allows transfer of contributions among a candidate's own controlled committees, but attribution to specific contributors is required in most cases. The Commission was being asked to determine under what circumstances carryover of funds should be allowed without attribution to specific contributors.

Staff provided the Commission with three options for consideration. The first option recognized that § 85317 allows the carryover of contributions only to a subsequent election for the same elective state office. Under option "A", funds raised in a primary election may be carried over to the general election for the same office, and funds raised in a special primary election may be carried over to a special general election for the same office. This would be consistent with the proposed interpretation of the "one-bank" account rule. An election and reelection to the same seat would be treated as separate elections to a separate office and would not fall within the scope of option "A". Staff favored the narrow construction of option "A" because it fit better with the overall goals of Proposition 34 to limit campaign contributions on a per-election basis.

Mr. Wallace explained that option "B" would treat each reelection to the same seat as an election to which funds can be carried over without attribution. This option was a viable interpretation of the statute and was favored by interested persons, but staff felt it weakened the Proposition 34 limits. They did not favor this option.

Chairman Getman opined that option "A" contains the correct statutory interpretation of Proposition 34 because § 85306 discusses transfers between controlled committees while § 85317 was silent on the issue. The Commission was considering requiring different committees for different elections. She noted that if § 85317 was allowed to mean carryover from one controlled committee to another it would only benefit incumbents. If the statute were interpreted to allow carryover from the primary to the general elections only, it would benefit incumbents and challengers in the same way.

Commissioner Knox disagreed, noting that § 85317 does not favor only incumbents because a novice would, under the broader interpretation, be permitted to carryover money from the primary to the general election. Also, if it had been the intention to limit carrying over funds from a primary election to the immediately following general election, that limitation would have been expressed in § 85317. Commissioner Knox believed that a fair reading of that statute would include carryover in reelections to the same elective state office.

Chairman Getman noted that the statute reads "A subsequent election for the same elective state office," and that regulation 18520 defines "same elective state office" as meaning the same term of office.

Mr. Wallace agreed, noting that it is consistent with Commission advice. He knew of no other provision in the PRA that would treat a reelection to the same seat as the same "election" as the initial race for that seat. He explained that a senate incumbent could be challenged by an assembly member, and that the assembly member would be subject to the transfer and attribution rules while the senate incumbent would not.

Chairman Getman questioned whether the term "same elective state office" will have to be clarified to indicate that it does not affect other provisions of the regulations if the treatment of it is different in this regulation than in other regulations.

Mr. Wallace responded that the proposed language of regulation 18520, which is consistent with current advice, would provide that "elective office" refers to "term of office." If it were construed in regulation 85317 to include the reelection to the same seat, it would result in an inconsistency that would have to be considered. He noted that § 18520 deals with the filing of a

statement of intention for election. Incumbents who desire to run for reelection to the same seat have been required to file a new statement of intention.

General Counsel Luisa Menchaca explained that staff intended to confine the interpretation of option "A" to § 85317. There could be potential problems in other sections.

Chairman Getman noted that it would be difficult to confine the interpretation to § 85317 if the term "same elective state office" is defined in the regulation.

In response to a question, Mr. Wallace stated that the term "elective office" also appears in § 85200.

Commissioner Knox stated that the term "same elective state office" is the term in question.

Chairman Getman stated that under current interpretation of § 85200, a candidate for "elective state office" would mean a candidate for a particular term of that office.

Commissioner Knox thought it was reasonable to draw a distinction between the words, "same elective state office" as used in § 85317 and any reference to the same term of a given office. He noted that § 85200 refers to filing a statement of intention for an elective state office, and that if the incumbent runs for another term another statement of intention would have to be filed. He did not believe that carrying over funds from one general election to another general election would excuse the candidate from filing a second statement of intention if the incumbent decides to run for that office again.

Chairman Getman stated that staff's interpretation would allow more consistency with the definition in §§ 85200 and 85317 if "elective state office" is a specific term of office. She agreed that it would be difficult to deal with attribution in the middle of a campaign. She noted that a candidate for reelection who transfers and attributes funds to the reelection committee may not be permitted to accept contributions if they were made by persons whose contributions to the previous election were transferred to the new campaign and if that transfer resulted in that person meeting the contribution limits for the new campaign.

Mr. Wallace responded that it is a question of interpretation of the statute. In many cases a candidate will have both an election and reelection committee at the same time, and that transfers and attribution would not be difficult in those circumstances. He noted that transfers are allowed in all cases, but that the attribution of those transferred monies keeps the transfers from being abused. He assumed that the statute intended to allow transfers without attribution from a primary to a general election because it would be too complicated to attribute transfers during the election.

In response to a question, Mr. Wallace stated that a person could be precluded from contributing to a subsequent election even though the statute gives that person the right to contribute, and that the transfer and attribution provisions meant to do that. He noted that the scope of Proposition 34 was to prohibit persons from contributing twice to the same election.

Chuck Bell, from Bell, McAndrews, Hiltachk and Davidian, commented that § 85317 provides that, "any subsequent election for the same office" should not be limited to mean primary to general elections only.

In response to a question, Mr. Bell stated that Proposition 34 intended to track the federal election scheme, and that § 85317 intended to allow transfers forward from the primary to the general elections, and again to the reelection campaign. Section 85306 provides that surplus funds can be transferred to a controlled committee for another office with attribution. In that way, contribution limits for elections to a subsequent different office are protected.

Mr. Bell explained that purpose of Proposition 73 was different than the purpose of Proposition 34 because § 85306 allowed candidates to transfer surplus funds. He noted that Proposition 208 had very restrictive provisions.

Mr. Bell supported staff option "B."

Chairman Getman explained that, under option "B," an incumbent would be given an advantage.

Mr. Bell responded that sometimes life is not fair, and noted that the federal district court has ruled that "campaign laws don't deal with all perceived evils."

Chairman Getman stated that option "B" would give a clear incumbent advantage. Option "A" provided a middle ground, allowing that contributions did not have to be returned to the contributor, that the money could be transferred, but that those transfers would require attribution.

Mr. Bell did not disagree with the policy, but believed that it was not supported by the interpretation of the section.

Commissioner Downey suggested that the transfer and attribution rules would only apply to the transfer or carryover to the primary campaign in the reelection. Once the primary campaign is over, under option "A," the candidates who have surplus funds would not have an attribution issue. Consequently, only the primary election has the prohibition on new money coming in from the same donors.

Lance Olson, of Olson Hagel, support option "B." He commented that if candidates are required to create a new controlled candidate committee to run for reelection, then under § 85306(a), a candidate has the right to transfer funds from one committee to another with attribution. However, § 85317 provides, "notwithstanding § 85306(a)" the candidate can transfer the money without attribution. He questioned whether requiring committees to set up another new committee and transfer monies with attribution under § 85306(a) would conflict with § 85317. The plain language of the "subsequent election for the same elective office," encompasses the concept of running for reelection. He noted that the language was modeled after the federal rule which is embodied in option "B." Mr. Olson noted that it may create an advantage for the incumbents, but that Proposition 34 was not designed to "level the playing field," and that the Supreme Court had directed that the government is not in the business of "leveling the playing field."

Mr. Olson stated that option "A" would impose an expenditure limitation on a candidate and that Proposition 34 does not impose any expenditure limitation other than the voluntary expenditure limits.

Mr. Wallace responded that Proposition 34 does interpret the primary and general elections as separate elections. He noted that § 85400 provides separate expenditure limits for those

elections. He did not agree that it ignored § 85317 to apply the provision only to the primary and general elections because it considers the purpose of Proposition 34. He believed that option "A" was consistent with what the voters adopted and intended to adopt when they passed Proposition 34.

Commissioner Swanson commented that she favored option "A" because the voters intended to put controls on contribution limits. She did not favor giving an advantage to an incumbent in option "B." She believed that option "A" was much cleaner, leaving no room for guessing the interpretation.

Commissioner Downey responded that the argument in favor of option "A" is that it brings in the specific term for the "elective state office." It would provide a narrow construction that the Commission might wish to give to any statute that would undermine attribution and the ability to identify the source of funds given to a candidate. He pointed out that the structure of the PRA separates primary and general elections. He agreed that the plain language of, "a subsequent election for the same elective office," created a problem, but preferred the idea of identifying separate elections and keeping them separate, as well as identifying contributors and supporting contribution limits. He did not agree that the incumbent would gain a very big advantage under option "B."

Commissioner Swanson stated that lawyers and laypersons look at things differently. Lawyers look at what is written down, but laypersons, like her, look at the common sense of an election being a real event and contributions being influence peddling opportunities. She believed that option "A" was a better option.

Chairman Getman pointed out that Commissioner Swanson's common sense interpretation was totally backed by the law. She noted that Proposition 34 did not take away the purposes and intents of the PRA, and that § 81002(e) provided that laws and practices unfairly favoring incumbents should be abolished in order that elections be conducted more fairly. She favored option "A."

Commissioner Knox agreed that the purposes and intentions of the PRA should be consulted, but he did not think that it allowed the Commission to ignore the plain meaning of the words. In this instance, he did not think that the language was sufficiently in doubt to require that the statement of purposes and intentions be considered.

Commissioner Downey stated that § 85317 could be interpreted to mean that the only possible subsequent election is the reelection campaign. A candidate would think that surplus funds from the general election could be carried over by reading § 85317.

Mr. Wallace explained that the funds could be carried over under option "A," but that they would require attribution. Staff interpretation was guided by the fact that it was for the same elective state office, and by the concept behind expenditure limits that each primary and general election is a separate election. He found it troubling to consider that funds could be carried over four years later without attribution.

Mr. Wallace explained that option "C" is very similar to option "B," using a broader approach allowing funds to be transferred from general election to reelection campaigns without attribution. Staff believed that if the Commission chose to interpret the statute to allow that carryover there should be some limitations. Option "C" contained optional decision points

placing limitations reflected in other statutes in Proposition 34, so that the interpretation could not be considered to override those other statutes. As an example, carryover would not be allowed until net debt was paid, in accordance with a statute and a regulation that provides that funds raised after an election must be used for net debt.

Chairman Getman disagreed with that approach, pointing out that there already was a specific statutory prohibition against raising money after an election except to pay off net debts. She found no basis in the statute for decision point 1 in option "C" and considered decision points 2 and 3 superfluous because they repeated other statutes that apply regardless of what is in the regulation. She did not believe that there could be a middle ground on this issue.

In response to a question, Mr. Wallace stated that staff could probably tailor the language to limit it specifically to the section, but that it would be a different interpretation of the concept than is used in the "one-bank" account rule.

Chairman Getman noted that it would not make any sense to require a new committee if carryover without attribution was allowed.

Commissioner Downey stated that he was persuaded that option "A" was the best interpretation.

Chairman Getman and Commissioner Swanson agreed.

Commissioner Knox supported option "B."

Chairman Getman suggested that the wording on lines 11 and 12 of the proposed § 18537.1 option "A" be changed from, "...without attribution as provided by..." to "...without the attribution required by...".

Mr. Wallace agreed that it was an appropriate change.

Chairman Getman moved that the Commission adopt option "A" with the change she suggested.

Ms. Menchanca noted that this vote was just for prenotice purposes.

Commissioner Downey seconded the motion.

Chairman Getman, Commissioners Downey and Swanson voted "aye." Commissioner Knox voted "nay." The motion carried by a vote of 3-1.

Mr. Wallace explained that regulations 18520, 18521, 18523, and 18523.1 had been modified to set up a "one bank account" system in which candidates will have to set up a new campaign bank account and new campaign committee for reelection to the same office. This concept will be contrary to staff advice initiated when Proposition 73 was in place.

Mr. Wallace noted that the Commission has already dealt with the redesignation rule twice, and that the Commission favored rejection of the redesignation rule. Option "A" would provide that redesignation would not be permitted. Option "B" would allow redesignation under limited circumstances. It would include all of the regulations in option "A" except regulation 18521 would be replaced with the option "B" version.

Mr. Wallace noted that one comment letter had been received from Mr. Bell, requesting that the redesignation rule be retained. Staff recommended that the redesignation rule be eliminated because it is better for the public and for the agency's enforcement ability to have separate committees and bank accounts for each election. Staff interpreted "election" as "each term of office."

In response to a question, Mr. Wallace explained that Franchise Tax Board had not taken a position on this issue.

Mr. Wallace stated that under Proposition 73, most limits were lost by court action, so redesignation was allowed. Now, however, limits are back in place, and it will be easier to implement them without redesignation.

In response to a question, Mr. Wallace responded that transferred contributions would have to be tracked through a bookkeeping process, and that it would raise issues related to debts since there are limits on raising funds for debt.

Enforcement Chief Steve Russo stated that, if redesignation is allowed, the only way to track the flow of money will be by auditing the committee's books. There will be no way for the public to know what is going on with the transfer of funds because it may not be publicly disclosed and the Commission will not know until there is an audit. Audits can be several years after-the-fact. Additionally, if the committee does not keep accurate records an investigation will be limited. A record keeping violation could be charged in those cases, but there may be a more serious violation that will not be discovered. If redesignation is not allowed, a paper trail will exist immediately in the bank records, and it will be a clearer record.

In response to a question, Mr. Russo stated that he did not anticipate an increase in the number of inadvertent mistakes because this will make a much simpler system. He believed that redesignation would cause more mistakes and more violations because there are now limits. If redesignation is allowed, staff would have to be vigilant in prosecuting record-keeping violations in order to ensure that mistakes are not made so that the more serious violations can be tracked.

Technical Assistance Division Chief Carla Wardlow stated that there will be some errors, but that for purposes of tracking the limits and giving the information to the public separate accounts and committees would be a better idea.

Mr. Bell stated that he was withdrawing his objection to redesignation because the Commission had decided to accept option "A" of the carryover issue. He noted that the only way the regulated community will be able to track those attributions would be to have a new committee and a new account or there would be no way to avoid inadvertent mistakes.

Chairman Getman moved that new committees and new bank accounts be required for each election cycle.

Commissioner Swanson seconded the motion.

There being no objection, the motion carried.

Mr. Wallace explained that staff received some public comments regarding changes to the text and language issues that require clarification. Those changes will be incorporated prior to noticing the regulations.

Mr. Wallace added that some non-substantive grammatical changes requested by the Chairman also would be made.

Mr. Olson questioned whether, under proposed regulation 18523.1(b)(3) candidates are prohibited from soliciting contributions for both the primary and general elections at the same time. He suggested that the regulation include language making it clear that candidates may solicit contributions for both the primary and general elections.

Mr. Wallace stated that he would work with Mr. Olson on clarifying language.

Mr. Olson noted his concern that candidates may instruct contributors pursuant to proposed regulation 18523.1(c), but contributors may not follow the instructions. If that should happen, candidates should be allowed to attribute the contribution pursuant to whatever the solicitation indicated.

Commissioner Knox asked what would happen if the Commission revised subparagraph (b)(3) so that the same solicitation applies to the primary and general elections and the candidate gets a contribution that fails to designate which election the contribution was for.

Mr. Olson responded that, if the candidate wanted to apply part of a contribution to the primary election and the remainder to the general election it should be permitted. He suggested that, if a candidate receives a contribution for the primary election in excess of the contribution limits, the excess could be put towards the general election.

Chairman Getman noted that the Commission had already decided that candidates would not be told what they had to do with such contributions.

Mr. Wallace stated that staff would consider Mr. Olson's comments and develop more acceptable language addressing his concerns.

Item #4. Proposition 34 Regulations: Termination of Committees - Second Pre-Notice Discussion of Proposed Regulation 18404.1 and Emergency Adoption of Regulation 18404.2.

Staff Counsel Holly Armstrong presented to the Commission and made available to the public additional changes to the emergency regulation and proposed regulation 18404.1 prompted by comments received from members of the public. She noted that staff would be working from the new versions.

Ms. Armstrong stated the emergency regulation provisions relate to the pre-January 1, 2001 committees controlled by candidates who never held or no longer hold the office for which the committee was formed. The regulation must be adopted as an emergency regulation because of the amount of work required to enable staff to locate and give notice to the committees prior to the termination date.

Ms. Armstrong stated that decision 1 would require that committees give all creditors at least 60 days notice prior to filing its terminating statement.

There was no objection from the Commission to decision 1.

Ms. Armstrong suggested that the language in regulation 18404.2(b), line 15, "...subject to subdivision (a) of this regulation..." be deleted. She explained that the language incorporated the changes suggested in August. It sets forth a procedure for extending the time within which to comply with the regulation by requesting the extension from the FPPC Executive Director. Decision 2 contemplates allowing the Executive Director's decision to be appealed to the Chairman.

In response to a question, Ms. Armstrong explained that staff recommended that the appeal be directed to the Chairman instead of the Commission because of their concern that the additional items on the Commission meeting agendas would be overly burdensome to the Commission.

Commissioner Swanson noted that if the Commission heard the appeal, it could create a delay of up to 30 days.

Chairman Getman stated that it may not be necessary to appeal the Executive Director's decision to the Chairman. She noted that, once people are accustomed to the new system, there should not be many requests for extension.

Commissioner Knox stated that he did not think it necessary for the full Commission to hear appeals.

Commissioner Knox suggested that an appeal be made to the Chairman, and that if it becomes too burdensome the Commission could consider other options at that time. He believed that someone in an appointed position should have the ultimate authority.

Commissioner Swanson favored an appeal because extenuating circumstances could result in the need for an extension. She suggested that the Executive Director and staff not encourage that process, but believed that the appeal process should be available for those cases with extenuating circumstances.

Commissioner Downey suggested that the Commission delete the appeal process.

Commissioner Knox responded that he did not think that the appeal process would be used often, but believed that it was a good idea to have the process available.

Commissioner Downey stated that if there was to be an appeal, it should go to the Chairman, not to the Commission.

Chairman Getman suggested that an appeal to the Chairman be included, but that the monthly Executive Director's report include a listing of any extensions that were granted. She suggested that the criteria language in proposed regulation 18404.2(b)(2) regarding whether a committee has a payment plan may be unnecessary.

Ms. Armstrong responded that if a committee was making an effort to make payments to a creditor, that would constitute good faith efforts.

Chairman Getman voiced her concern that if a committee did not meet criteria listed in the regulation but had good grounds for an extension the Commission might not be able to grant the extension.

Ms. Armstrong noted that only one of the criteria needed to be met in order to grant the extension.

Ms. Menchaca suggested that subdivision (2) be changed to be less specific.

Commissioner Downey suggested that subsection (2) be eliminated and treated under subdivision (1)(C).

Chairman Getman stated that if a person had the ability to discharge debts they would not need to request an extension. She suggested that the language in (1)(C) be changed to read, "Demonstrates the ability to discharge all of its debt, loans and other obligations, " and that subparagraph (2) be eliminated.

Commissioner Swanson suggested that the appeal to the Chairman must be made within 2 working days instead of 10 days because it would reduce the delay and force the issue to be resolved.

Commissioner Knox stated that 2 days would be too short.

Chairman Getman agreed.

The Commission agreed that the appeal should be made within 10 days.

Ms. Armstrong pointed out that there was no time frame set up yet for the Chairman to make a decision on the appeal.

Chairman Getman stated that she did not think it would be necessary, pointing out that there may be times when the Chairman is not available. She did not think it would be necessary to make the Executive Director's decision final if the Chairman was unavailable because she did not think that the Chairman would be unavailable for an unreasonable length of time.

Commissioner Downey suggested that "...all of..." be eliminated from (1)(c) and "debts" be changed to "debt" because a committee may be able to discharge some of its debt.

Ms. Armstrong pointed out that the finding of emergency and statement of fact was attached to the proposed regulation.

Mr. Olson questioned whether, under subsection (a)(1), a candidate who ran for office in 2000 and lost that election with debts would have to terminate the 2000 committee if the candidate chose to run for office again in 2002.

Chairman Getman responded that the 2000 committee would have to be terminated because it is a pre-Proposition 34 committee.

Mr. Olson noted that the regulation does not make that clear, and that he currently has several clients who could be in this category.

Ms. Wardlow explained that the language, "...as of the effective date of this regulation..." should cover that situation.

Commissioner Downey agreed that it was not clear, and suggested that language be added reading, "... who were not elected prior to January 1, 2001."

Chairman Getman questioned whether the regulation was supposed to apply to the situation Mr. Lance presented, or if it was meant to apply only to committees for candidates who are not in office.

Ms. Menchaca responded that it was meant to apply to all committees.

Chairman Getman stated that the Commission was trying to draft a regulation that closed out all pre-Proposition 34 committees except for incumbents who continue to hold the office for which that pre-Proposition 34 committee was set up.

Chairman Getman suggested that staff work on the language in (a) and (a)(1) and bring it back later in the meeting for emergency adoption.

Ms. Armstrong explained that decisions 2 and 3 of proposed regulation 18404.1 deal with time frames. Decisions 1, 4, 5 and 6 deal with issues already discussed and decided. She confirmed that the Commission chose option "a" of decision 1.

Ms. Armstrong stated that decision 2 provides options of 9 or 12 months from the time a candidate is no longer in office or is defeated in an election for termination of controlled committees without debts. She noted that staff had received no objections to the 9 month option.

Commissioner Knox stated that he favored the 9 month option.

In response to a question, Ms. Armstrong stated that public input indicated that it took from 6 to 9 months to receive outstanding bills. Staff had no objection to the 9 month option.

There was no objection from the Commission to the 9 month option.

Ms. Armstrong explained that decision 3 deals with committees that have debt and provides options of 12, 18, or 24 months for termination of the committees. She noted that staff received one public comment letter favoring the 24 month period.

There was no objection from the Commission to the 24 month option.

Ms. Armstrong noted that the Commission chose not to allow redesignation in decision 4.

Chairman Getman stated that the redesignation language was still needed because some committees have already been redesignated for a 2001 election.

Ms. Menchaca pointed out that the language may not be necessary because the redesignation should have occurred already by the time these regulations are adopted.

Ms. Wardlow stated that it would be better to remove the language in order to eliminate possible confusion.

Ms. Armstrong stated that subparagraph (b)(3) was added to deal with candidates who were defeated in special elections that took place during 2001 but prior to the effective date of the regulation. For those candidates the 9 or 24 month time frame will begin when the regulation becomes effective.

Ms. Armstrong noted that decision 5 deals with notice to creditors and decision 6 deals with the appeal to the Chairman. Both of these decisions were already considered by the Commission in the emergency regulation.

Chairman Getman stated that the language of subparagraph (f) contained a sentence reading, "Once an extension has been granted, any funds raised by the committee must be used to pay off the existing debt or to pay for fundraising costs." This sentence repeated statutory language dealing with net debt fundraising. She was concerned that including that language would imply that the statute does not have broad coverage prohibiting any committee from raising funds after the election is over except to pay off net debt.

Ms. Armstrong responded that enforcement staff requested that language and that it was also included in the emergency regulation. She agreed that it could be removed, and noted that staff would remove it from the emergency regulation as well.

There was no objection from the Commission to approving regulation 18404.1 at the prenotice stage as discussed.

Item #5. Proposition 34 Regulations: Pre-notice Discussion of a Regulation Interpreting Section 85311, Aggregation of Contributions Among Affiliated Entities.

Senior Commission Counsel Larry Woodlock explained that the language of § 85311 is actually the language of a regulation the Commission adopted in the mid-1990s and that there did not seem to be any doubt or uncertainty about what that regulation meant. He saw no reason to write a regulation to interpret this statute. He asked the Commission whether they wanted staff to prepare a regulation.

Chairman Getman suggested that the public should have some way of knowing that the *Lumsdon* and *Kahn* opinions are valid interpretations of this statute.

Mr. Woodlock responded that a newcomer looking at the statute may not need to know the details of those opinions unless he or she does not understand what "directs and controls" means. Staff believed that "directs and controls" is clear, but in those cases where it is not, the parties will request clarification from the Commission.

Ms. Menchaca stated that the opinions can be referenced under that statute when the PRA is printed.

In response to a question, Mr. Woodlock stated that Proposition 208 letters governing aggregation focused entirely on the new standard introduced by Proposition 208. The changes introduced by Proposition 208 were repealed by Proposition 34 and the questions addressed in

those letters are no longer issues since the Proposition 208 rules are no longer the legal standard for affiliation.

Mr. Woodlock noted that regulation 18428 has not been amended in some time, and that he saw no reason for drawing a distinction between the criteria governing affiliation for purposes of contributions and for all other purposes. Staff believed it would be easier for affiliated entities to understand and comply with the law if the criteria for affiliation were the same for all purposes. Staff proposed changes to regulation 18428 that would make it consistent with the statute and suggested that the issue be presented to the Commission early next year for adoption of amendments.

There was no objection from the Commission.

Item #8. Proposition 34 - Adoption of Emergency Regulations 18421.4 (Reporting Cumulative Amounts) and 18542 (Notification of Personal Contributions in Excess of the Voluntary Expenditure Limits).

Commission Counsel Scott Tocher explained that the Commission had adopted Regulations 18421.4 and 18542 on an emergency basis in June and that those regulations will expire during October 2001. Staff proposed no changes to either regulation and recommended permanent adoption of both regulations.

Mr. Tocher stated that regulation 18421.4 dealt with the mandatory limits on contributions received by candidates for elective state office and by the committees that make contributions to those candidates. The Commission previously decided that (1) candidates for elective state office will be required to disclose the cumulative amount of contributions received per election from each contributor itemized on the candidate's campaign statement; (2) candidates for elective state office who have accepted the voluntary expenditure limits for an election must disclose the total amount of expenditures which count toward that election; and (3) recipient committees that make contributions to candidates for elective state office will have to disclose the cumulative amount of contributions made to those candidates per election.

Commissioner Downey stated that the proposed regulation seems to require that recipient committees report the cumulative total of contributions received.

Mr. Tocher responded that a strict reading of the language of the regulation could lead to that interpretation, but he did not believe that was intended by the regulation. The instructions to schedule D of the Form 460 indicate that only contributions made in an election to candidates who have a limitation need to be disclosed.

Ms. Wardlow added that the instructions for reporting contributions received specifically provide that the additional information is only required by state candidates and not other types of committees.

Chairman Getman questioned whether the regulation needed to be changed because, as drafted, it applies to state recipient committees, and requires that they report the cumulative totals of contributions received.

Ms. Menchaca agreed, but asked that the Commission adopt the regulation permanently because it is an emergency regulation that expires around November 17, 2001. Staff could bring

amending language back to the Commission in December. She noted that the form instructions make the interpretation clear, and that the title of the form itself indicates that it applies to state candidates and state recipient committees.

Chairman Getman stated that the form should be consistent with the regulation, and not vice-versa.

In response to a question, Ms. Menchaca explained that changing the language of the regulation would require a waiting period for public input and that the emergency regulation would expire before that waiting period was over.

Ms. Wardlow pointed out that the next filing deadline for state candidates and committees is not until January 10, 2002, and that an emergency adoption in December would mitigate the problem.

Chairman Getman suggested that the Commission consider not adopting the regulation on a permanent basis since there is a problem with it and since the next filing deadline is not until January 10, 2002.

Ms. Menchaca stated that it would work as long as the regulation is adopted in time for the next filing period and noted that staff would be able to do it in time for the next filing period.

There was no objection to letting the emergency regulation expire.

Mr. Tocher explained that regulation 18542 provided a procedure of notification for personal contributions in excess of voluntary expenditure limits pursuant to § 85402. Candidates will be required to file an amendment to the statement of intention within 24 hours of the candidate's making of a contribution and notify their opponents in that election.

Commissioner Knox noted that when a candidate contributes more than \$400,000 of the candidate's own money, a notification must be made under regulation 18542, pursuant to §85402(b). He questioned whether the Commission was required to set the threshold at \$400,000 for assembly candidates under the statute.

Mr. Tocher explained that § 85402 refers to the limits in the statute itself under subparagraph (a), the limits described in § 85400.

Chairman Getman noted that the regulation interprets § 85402(b), requiring timely notification of candidates making personal contributions to their own campaigns.

Commissioner Knox suggested that the analysis should start with Government Code section 85402(b). He thought that the threshold was very high, and appeared to have nothing to do with the total amount raised.

Ms. Wardlow commented that other reporting sections are applicable during the period of time before the election, including the 24-hour reporting of contributions of \$1,000 or more during the election cycle, and the \$5,000 report at other times, and contributions from the candidates would trigger those reports also. Staff viewed this as a mechanism to notify the public and opponents when the expenditure limits are lifted.

Commissioner Knox commented that § 85402(a) covers the lifting of the limits, but § 85402(b) has nothing to do with lifting the limits.

Chairman Getman agreed that under current law anytime a candidate receives a contribution of \$5,000 or more a report must be made, including a contribution of the candidate's own funds.

Commissioner Knox stated that the information is available with or without § 85402.

Ms. Menchaca stated that the provision is redundant, but that this was one of the few sections of Proposition 34 that instructs the Commission to provide a regulation.

There was no objection to adopting in final form regulation 18542.

Item #14. In the Matter of Salvador Blanco, FPPC No. 2000/672, OAH No. N2001050180.

Commission Counsel Michelle Bigelow stated that no one representing the respondent was present, nor had there been any indication from Mr. Blanco that he or anyone representing Mr. Blanco would be appearing.

Ms. Bigelow explained that the Commission was being asked to decide whether to adopt the proposed decision of Administrative Law Judge Spencer Joe in the above named case. She explained that Mr. Blanco had a filing obligation while holding the Attorney Position for the San Joaquin Valley Air Pollution Control District Hearing Board. Mr. Blanco did not timely file his 1998 and 1999 annual statements of economic interest. He did file those statements on November 3, 2000, after much prodding from both the city clerk and FPPC investigator Bill Motmans.

Ms. Bigelow reported that the Administrative Law Judge found that Mr. Blanco did not meet his 1998 and 1999 filing obligations and proposed a maximum fine of \$2,000 per count, for a total fine of \$4,000. The maximum fine was found appropriate because Mr. Blanco had numerous reminders and requests to file both before and after his 1998 and 1999 deadlines. Additionally, Mr. Blanco failed to timely file four out of the five statements since assuming office. Finally, Mr. Blanco is an attorney and his disregard for the law is grossly negligent if not intentional. As an attorney he understood his obligations under the law but chose to ignore those obligations.

Ms. Bigelow recommended that the Commission impose the maximum fine of \$4,000 recommended by the Administrative Law Judge.

In response to a question, Ms. Bigelow reported that Mr. Blanco was served with a notice of the Commission hearing on August 7, 2001. He was also served with the brief in support of the proposed decision on August 21, 2001. She noted that this is not the first time that Mr. Blanco was aware of scheduled hearings and chose not to appear at those hearings.

The Commission adjourned to closed session at 12:04 p.m.

The Commission reconvened in open session at 1:20 p.m.

Chairman Getman announced that the Commission voted to adopt the Administrative Law Judge's decision in its entirety.

Item #4. Proposition 34 Regulations: Termination of Committees - Second Pre-Notice Discussion of Proposed Regulation 18404.1 and Emergency Adoption of Regulation 18404.2.

Chairman Getman announced that revised language for proposed regulation 18404.2 had been developed by staff and copies were available.

Ms. Armstrong explained that the revised draft included the changes made earlier in the day and the proposed change for subsection (a)(1). Staff did not believe that a change was necessary, but added clarifying language for the Commission's consideration. The new language provides, "Specifically, committees controlled by candidates who hold elective state office as of the effective date of this regulation, other than the committee formed for the election to the office they now hold, must comply with this regulation."

Commissioner Knox asked what would happen to Mr. Olson's hypothetical candidate who ran for office once and lost, and then ran again and won and currently holds office.

Chairman Getman stated that there would be ambiguity because the candidate would have two committees open - one for the seat they currently hold and one for the prior term. She questioned whether it was clear under subparagraph (a)(1) that the prior committee would have to be terminated.

Ms. Armstrong stated that the intent was to allow the committee for the office currently held to remain open while terminating the committee for the prior election that the candidate lost.

Commissioner Downey did not agree that the loophole was closed because the candidate did not hold office as of the effective date of the regulation.

Ms. Armstrong pointed out that regulation 18404.1 would cover those situations. She noted that the issue revolved around pre-2001 committees where the candidate never held or no longer holds office.

Ms. Menchaca stated that Mr. Olson's hypothetical situation revolved around a person who was elected in November 2000 and is currently in office through 2001 and whether the person still serving a two or four year term would be required to terminate a committee.

Commissioner Knox stated that the original proposed language of subparagraph (1) provided that it applies to candidates who "...no longer hold the elective state office for which the committees were formed." In the example provided by Ms. Armstrong, the candidate still held the office. The Commission does not want to close that committee.

Chairman Getman stated that the committee should be closed after November 2002 because it is a pre-Proposition 34 committee. That committee is open now because the person is in office now.

Ms. Armstrong stated that regulation 18404.1 will cover that situation.

Commissioner Knox noted that this regulation was not supposed to address that issue.

Chairman Getman stated that this regulation should address the issue because it involves candidate controlled committees for elections held prior to January 1, 2001. Regulation 18404.1 addresses committees organized after January 1, 2001.

Ms. Armstrong pointed out that subsection (a) deals with candidates who were elected prior to January 1, 2001 who are currently in office. Mr. Olson's hypothetical situation involved a client who ran for the assembly prior to January 1, 2001 and lost. The candidate then opened another committee and ran again prior to January 1, 2001, won the election and is now serving in that office. The candidate still has the first committee, with debt, for the same office, and Mr. Olson questioned whether regulation 18404.2 applied, requiring him to close the older committee for the same office.

Chairman Getman suggested that language be added stating that the official can no longer hold the term of elective state office for which the committee was formed.

Commissioner Knox agreed that a reference to the term of office needed to be included.

Chairman Getman noted that the Commission had already decided that "elective state office" means a term of elective state office, but agreed that there is confusion, and that clearer language was needed.

Commissioner Knox agreed, but noted that the revised language did not accomplish that goal. He suggested that after the words, "...elective state office..." language should be added reading, "...during the term of office."

Ms. Menchaca stated that the proposed language was fine without revision because the language "...for which the committees were formed..." accomplished the goal of the Commission.

In response to a question, Ms. Menchaca stated that it could be clarified with an advice letter. She was concerned that the additional suggested language could create additional ambiguity.

Chairman Getman noted that the Commission may want, at some time, to define "elective state office" to mean a specific term of office.

Ms. Menchaca agreed. She noted that the permanent regulation does not have that problem because it refers to leaving office.

In response to a question, Ms. Armstrong stated that this regulation will not be brought back to the Commission because the permanent regulation will take effect in December.

Chairman Getman suggested that staff study the permanent regulation to see whether it needs to clarify that the elective state office refers to a particular term of office.

Commissioner Knox observed that current policy allows redesignation and asked how this regulation will affect that policy.

Ms. Armstrong stated that the regulation will not affect a redesignated committee because the redesignated committee would then become the committee for the current term of office.

Commissioner Swanson suggested that line 7 of the original language read, "...no longer holds the specific term of the elective state office..."

Commissioner Knox suggested that the wording could be changed to, "...no longer hold the elective state office during the term of office for which the..."

Commissioner Downey suggested that the term "elective state office" be defined somewhere in the regulations rather than try to do it piecemeal in each regulation where the term is used.

Commissioner Knox stated that he was content with the most current version of the regulation presented by staff, absent the highlighted language on lines 9, 10, and 11 for emergency purposes.

Chairman Getman agreed, but added that the term "elective state office" needed to be defined somewhere in the regulations as meaning "term of office."

Chairman Getman moved that the Commission adopt emergency regulation 18404.2 with the language on lines 9 through 11 deleted.

Commissioner Downey seconded the motion.

Commissioners Downey, Swanson, Knox and Chairman Getman voted "aye." The motion carried by a vote of 4-0.

Item #9. Proposition 34 - New Online/Electronic Disclosure Reports; Permanent Adoption of Emergency Regulations 18539, 18539.2 and 18550.

Mr. Tocher presented the three emergency regulations which are due to expire in October of 2001. He explained that Proposition 34 required three new campaign disclosure reports that must be filed electronically. Regulations 18539 and 18550 require 24-hour reports for contributions and independent expenditures made during an election cycle, and a 48-hour report that requires disclosure of information relating to certain communications made within 45 days of an election. Staff proposes no changes to those regulations.

Commissioner Swanson expressed her concern that 24-hour reporting may not allow the candidate enough time to do the reporting. She noted that a candidate who holds a fundraiser on a Saturday night may not have time to do the report. She agreed that it is important to make the information available to the public, but noted that 24 hours may not allow a reasonable amount of time for the report.

Mr. Tocher responded that the 24-hour requirement is a statutory requirement that the Commission cannot change. He pointed out that electronic filing can be done any time of day.

Commissioner Swanson noted that someone would have to input that data. She asked whether the 24-hour time frame could be changed.

Ms. Wardlow responded that it would require a legislative amendment to § 85309.

Commissioner Knox asked whether the civil code providing that any time a legal duty has to be performed on a weekend or holiday the due date becomes the next working day would apply for these regulations.

Ms. Wardlow read from regulation 18116, which outlines the exception to the Saturday/Sunday/holiday rule.

Chairman Getman stated that the regulation will have to be amended because regulation 18116 does not apply to this regulation.

Commissioner Knox explained that as the law currently stands, there is an automatic extension to the next working day for the report.

Mr. Tocher responded that the issue involved adoption of an emergency regulation due to expire on or about October 19, 2001. If the Commission chose to change the language, it would delay approval of the regulation and there would be no regulation to govern the issue between the expiration of the emergency regulation and the adoption of the permanent regulation.

Chairman Getman noted that there are online disclosure reports that are due right now which would be affected.

Chairman Getman agreed that there is a concern if the emergency regulation is not approved, but expressed a substantive concern with the drafting of the regulation. She believed that the regulations should list the requirements that need to be met without reference to a particular form. In this case, Form E-497 is not required by a statute yet is included in the regulation.

In response to a question, Ms. Daniels-Meade stated that the Form 497 can be filed electronically, but that there is not an E-497 that can be filed without a vendor.

Chairman Getman expressed concern that the Commission was being asked to adopt a regulation with a reference to a form that does not exist.

Ms Menchaca noted that the regulation creates the authority for the report, but it is not a paper report. She agreed that it is preferable to include in the regulation the content of the report. In this case, subdivision (c) refers to subdivision (b) of Government Code § 84203. It creates confusion in determining whether just the content was meant to be applied.

Commissioner Knox stated that regulation 18539 does not require reporting on the form. Rather, it requires that the information required by Government Code section as prescribed in the form be reported.

Chairman Getman agreed that the proposed regulation would work, but was troubled by adopting subsection (c) because it indicates that form E-497 can be used for disclosure of late contributions, because there is no form E-497.

Ms. Daniels-Meade stated that there is a form E-497 in the sense that a vendor supplies the electronic Form 497. If AB 696 is passed, the form will be required to be online and would no longer be available only through a vendor.

In response to a question, Ms. Wardlow agreed that the Form E-497 does not currently exist.

Chairman Getman reiterated that subdivision (c) allows the use of a document that does not exist. She suggested that staff could bring the issue back to the Commission in December.

Ms. Wardlow responded that the delay would be problematic because there are ongoing filing requirements. She noted that the information is exactly the same between the late contribution report and the \$1,000 and \$5,000 reports. The current Form 497 is used by PACs and local candidates and other filers that are not required to file the \$5,000 report and the 90-day cycle reports. She suggested that, instead of a new form, the name of the "late contribution report" be changed to the "electronic/late contribution report."

Ms. Menchaca argued that the statute established the authority for the report, and that the regulation merely explains how to proceed electronically.

In response to a question, Ms. Menchaca stated that subparagraph (c) could be deleted, but only if the adoption of the regulation was delayed. She suggested that another emergency adoption could be done, explaining that SB 34 added subdivision (c) and (d) to § 85309 that the Commission must also implement.

Chairman Getman asked whether the reports required under § 85309 would still have to be filed if the Commission did not adopt the emergency regulation.

Ms. Menchaca responded that the statute requires that the reports be filed, and that the Commission would have to provide a practical means of filing those reports.

Commissioner Knox noted that the statute refers only to online filing, and suggested that the statute be used for guidance instead of a regulation.

Chairman Getman noted that the regulation implies that the current Form 497 has been replaced by a new Form E-497, which is not yet true.

In response to a question, Ms. Daniels-Meade stated that filing the report in other than the Cal-format electronically defined Form 497 would not show up on the web site.

Chairman Getman pointed out that the regulation does not allow use of the Cal format 497, but allows use of a Form E-497 that does not exist.

Ms. Daniels-Meade stated that the Secretary of State's office has been interpreting the E-497 to be the electronic transmission of the currently defined Form 497, so there was no problem for them.

Commissioner Knox questioned whether it would create problems for filers if there were no regulation in place and filers had to look to § 85309 to ascertain their duties.

Ms. Wardlow stated that it would not stop the reporting, noting that candidates are filing this information now using the existing Form 497 provided by the Secretary of State through the Cal-Access program. That form requires the information in § 84203. Staff could come back with a regulation that sets out the requirements of the statute. It would not stop people from filing the form. She asked that staff be allowed to give advice that the reports are not required to be filed on paper.

Commissioner Knox suggested that the current 497 used for online filing would satisfy the requirements of § 85309.

Chairman Getman stated that she would be more comfortable relying on the statute instead of adopting the regulation.

Ms. Wardlow noted that, at the time the emergency regulation was adopted, staff expected the electronic forms to be in place much sooner.

There was no objection from the Commission to letting the emergency regulation expire, and bringing back for consideration a regulation with the substantive requirements.

Mr. Tocher asked whether the Commission wished to handle regulation 18550 in the same manner.

Chairman Getman agreed. Regulations 18550 and 18539 would not be permanently adopted.

There was no objection to adopting regulation 18539.2.

Mr. Tocher noted that the statute requires reporting payments of \$50,000 for addressing a candidate in an election but not expressly advocating the election or defeat of that candidate. Additional reporting is required in those circumstances when contributions of \$5,000 or more are made for the purposes of making that communication. He questioned whether an organization that receives a payment of \$5,000 or more from a number of smaller contributors must disclose the information required for each person who contributed towards that \$5,000. Staff believed that subdivision (b) of the statute required disclosure only for contributions of \$5,000 or more from an individual. He noted that staff received a comment letter agreeing with staff's interpretation.

Chairman Getman noted that it would be consistent with the \$5,000 reporting required by SB 34.

There was no objection from the Commission to the staff interpretation.

Chairman Getman clarified that regulation 18539 is not adopted, 18539.2 is adopted permanently, and 18550 is not adopted.

Upon recommendation by staff, Chairman Getman moved that the Commission adopt regulation 18539.2.

The motion was seconded by Commissioner Downey.

Commissioners Downey, Swanson, Knox and Chairman Getman voted "aye." The motion carried by a vote of 4-0.

Item #10. Proposition 34 - Voluntary Expenditure Limits - Emergency Regulation 18543.

Mr. Tocher explained proposed emergency regulation 18543 implementing § 85402 provides that notification by a candidate who contributes personal funds in excess of the expenditure

limits would lift the expenditure limits for opposing candidates who may have accepted them. The Commission was being asked to consider two issues in the emergency regulation.

Mr. Tocher explained that when the contribution occurs in the primary election, the first issue was determining who the opposing candidate is, and whether the expenditure limits lifted during the primary are then lifted for the general election. Staff presented draft regulations proposing different options for the issues.

Chairman Getman stated that § 85402(a) refers to a candidate who has filed a statement accepting the voluntary expenditure limits, and questioned whether that statement was defined by statute or regulation.

Mr. Tocher responded that it was part of the candidate's statement of intention.

Chairman Getman pointed out that the statement of intention was filed once. Consequently, if a candidate has accepted the limits for the primary, the candidate has also accepted the limits for the general election and cannot change that decision.

Mr. Tocher agreed.

Commissioner Knox stated that it did not matter whether it was done on a statement of intention or on a piece of paper, but that it did have to be done at the time the statement of intention is filed.

Chairman Getman read from § 85401(a), noting that it required a statement of acceptance or rejection of limits set forth in § 85400, which contained one set of limits for the primary election and one set of limits for the general election.

Commissioner Knox responded that the choice must be filed at the time the statement of intention is filed. In response to a question, he stated that he did not think that the statute considered accepting the limits for the primary but not for the general election for the same term of office.

Commissioner Downey noted that subsection (b) provides that if the limits are rejected in the primary, the candidate has 14 days after the primary to accept the limits in the general election.

Commissioner Knox observed that under those circumstances it would be possible to break up the acceptance of the expenditure limits. It suggested, however, that under other circumstances the candidate could not break up the acceptance of the limits. Consequently, for most candidates, one choice in advance of the primary would bind the candidate to those expenditure limits throughout the primary and general elections, or until someone else exceeds the expenditure limits.

Chairman Getman noted that it limits the Commission's options.

Mr. Tocher noted that, "opponent" in the primary election normally referred to the opponent seeking the same nomination. If there is no one else running for that nomination, the candidate is considered unopposed.

Commissioner Knox stated that if a candidate from one party refused the expenditure limits and exceeded them in the primary election, the other candidates in that party would have the expenditure limits lifted.

Mr. Tocher explained that expenditure limits for the other candidates could only be lifted if the candidate who exceeded the limits did so by making a personal loan to the campaign.

Commissioner Knox was concerned that both candidates in the party could spend more money in the primary than the candidate(s) in the other parties who are still bound by the expenditure limits they accepted. That scenario would benefit the party that exceeded the expenditure limits.

Mr. Tocher agreed, noting that the Commission could consider, in that scenario, lifting the expenditure limits for all candidates in the general election because everyone is an opponent in the general election. In that way, the benefit to the party that exceeded the expenditure limits would be mitigated.

Commissioner Knox questioned why the expenditure limits should not be lifted for all candidates in all parties when the expenditure limits were exceeded during the primary.

Mr. Tocher stated that limits would become more fragile and that it could increase the circumstances under which elections would be held without expenditure limits.

Commissioner Knox suggested that it might enhance the use of expenditure limits because candidates might be more inclined to accept expenditure limits if they thought it was more likely that those limits would be lifted.

Commissioner Downey stated that he did not believe separating the primary from the general elections will not work in this regulation. The incumbent generally runs unopposed in a primary, while the other party may have a hotly contested primary. Therefore, the opponent to the incumbent in the primary is the other party. Commissioner Downey strongly supported allowing all candidates in the primary to exceed the spending limits in the primary and general elections once the spending limits have been lifted.

Chairman Getman noted that the statute discusses "an opposing candidate" and not an "opponent," which argued for a broader definition because everyone running for the office is an opposing candidate.

Mr. Tocher agreed. He asked whether the Commission supported proposed version 1, which lifted the expenditure limits in the primary and the general election for all candidates.

Commissioner Knox agreed.

Chairman Getman pointed out that if the limits are lifted in the primary and the candidate who contributed personal funds loses the primary election, there is no reason to lift the limits for the general election because the person who would be able to contribute the additional funds is no longer in the race.

Mr. Tocher stated that it would be an opportunity to restore the expenditure limits.

Commissioner Downey questioned whether, if other candidates exceeded the limits during the primary election, the limits could be put back in place for the general election.

Mr. Tocher referred the Commission to version 2, option 2 to resolve the issue.

Chairman Getman noted that the statute could be read either way, but that the reason for lifting the limits in the general election is lost in her example.

Commissioner Knox questioned whether, if expenditure limits were in effect for the general election after having been lifted during the primary election, the limits would automatically be in place for that general election because the candidate who first exceeded them is no longer in the election. He asked whether candidates would need to file new statements of intention.

Mr. Tocher responded that it would have to happen automatically.

Commissioner Knox noted that it could be impractical because the candidate has already begun fundraising at a different level.

Mr. Tocher pointed out that the fundraising would be permitted, provided it did not include a personal contribution, and that the candidate would still be considered under the expenditure limit if the candidate did not spend funds in excess of the limit.

In response to a question, Mr. Tocher stated that he did not think that it would be necessary to advise candidates that the expenditure limits were back in place for the general election because it would be clear from the regulation.

Commissioner Knox noted that other candidates may have exceeded the limits during the primary, but that they were not the first to exceed the limits.

Chairman Getman pointed out that they would not have necessarily exceeded the limits with personal contributions. She questioned what would happen if a candidate had exceeded the limits with personal contributions after the limits were lifted because another candidate exceeded the limits with personal contributions. She suggested that the limits be lifted once and kept lifted.

Commissioner Downey asked why the limits could not be put back on for the general election if a wealthy self-financed candidate in the primary who caused the limits to be lifted lost the election.

Commissioner Swanson stated that there was once a law that allowed voting in the primary across party lines, and that if that scenario were still in effect the regulation could be applied evenly. However, the primary election is now a separate election that stands on its own, and she believed that it would be better to deal with it separately.

Chairman Getman disagreed, noting that the statute contemplates that once a candidate spends enough personal funds the other candidates cannot compete.

Commissioner Swanson stated that the Supreme Court ruled that candidates can spend all the money that they want to spend.

Chairman Getman agreed, but noted that by doing so the cost for other candidates increases if they want their message to be heard.

Commissioner Swanson stated that the electorate weeds those people out. She did not like the idea of the Commission being involved in regulating spending to the extent that it tries to make spending even. She supported lifting limits in the primary within the party affected.

Chairman Getman suggested that the Commission first consider whether one candidate who exceeds the contribution limits with personal funds in the primary election lifts the limits for candidates in the party or all candidates in the primary election.

Commissioner Swanson stated that the limits should be lifted just for the primary election within the same party.

Chairman Getman supported lifting the limits for all candidates in the primary election.

Commissioners Downey and Knox agreed that the limits should be lifted for all candidates in the primary election regardless of their party affiliation.

Chairman Getman asked whether the Commission wanted those limits to remain lifted for all candidates in the general election or whether those limits should be put back into effect for the general election.

Mr. Tocher added that the Commission could also consider lifting the limits if the candidate who caused the limits to be lifted in the primary wins the primary election, or placing the limits back into effect if the candidate who caused the limits to be lifted loses the primary election.

Commissioner Downey commented that if the candidate who exceeded the limits by spending personal funds in the primary election advances to the general election, then the limits should be lifted for the general election. However, if that candidate does not advance to the general election, and the remaining candidates all accepted the limits and did not exceed the limits during the primary election, the limits should be put back in place for the general election. He believed that to be staff's proposed version 2, option 2.

Commissioner Knox stated that once the limits are lifted the dynamics of the election have changed and it would be unrealistic to place the limits back on. He believed that once the limits had been lifted, they should be lifted for everyone running for that office for the remainder of the election.

Commissioner Downey disagreed, noting that if the wealthy candidate is gone and the remaining candidates have indicated that they want limits, then the limits should be allowed.

Commissioner Knox responded that the fundraising and entire approach of the election may have become so changed by the lifting of the limits in the primary election that it would be unrealistic to get back to the limits in the general election.

Chairman Getman pointed out that §§ 85401 and 85402 provide that candidates have the opportunity to accept or reject the limits only once, and therefore lifting the limits once would be consistent with those statutes.

Ben Davidian, from Bell, McAndrews, Hiltachk and Davidian, observed that a campaign against a candidate who has a lot of personal resources generally prepares for a long-term costly campaign battle, based on the presumption that the wealthy candidate will be the opponent during the primary and general elections. If the wealthy candidate then loses the primary and the limits are placed back on, the candidate would then have to undo long term spending commitments made during the primary.

Mr. Tocher noted that Mr. Davidian's comments would be consistent with version 1 of the staff proposal.

Commissioner Knox moved that the Commission adopt version 1 of the staff proposal.

Commissioner Downey seconded the motion.

Mr. Tocher stated that the finding of emergency was attached to the staff proposal.

Commissioners Downey, Swanson, Knox and Chairman Getman voted "aye." The motion carried by a vote of 4-0.

Item #11. Proposition 34 Regulations: Transfer and Attribution (§ 85306) -- Repeal of Emergency Regulation 18536 and Adoption of Regulation 18536; Reporting of Transferred Funds on Special Reports.

Ms. Wardlow presented this regulation for adoption, noting that the emergency regulation will expire in November 2001. Staff recommended changes in the regulation, and was requesting that the emergency regulation be repealed and the revised regulation 18536 be adopted.

Ms. Wardlow explained that the revised regulation includes one technical change requiring disclosure of committee ID numbers when attributed funds are being disclosed.

Ms. Wardlow explained that when a transfer has been attributed to a particular contributor and the contributor unknowingly makes a subsequent contribution it could be a violation of the Act. Staff included language in the revised regulation that would prevent this type of inadvertent violation of the Act, and would allow the committee to return to the contributor those contributions that were in excess of the contribution limits.

Chairman Getman moved that emergency regulation 18536 be repealed and revised regulation 18536 be adopted.

Commissioner Knox seconded the motion.

Commissioner Swanson noted that the revised regulation 18536(b) addresses inventory equipment and fair market value of assets. She explained that the Commission had previously discussed the difficulty of ascertaining the costs of inventory.

Ms. Wardlow responded that the Commission had discussed the issue while making the decision regarding the calculation of net debt and cash-on-hand for purposes of determining how much money can be raised after an election. The Commission had decided not to include computer equipment and similar items in that regulation.

Chairman Getman stated that since the Commission did not consider it an asset of the committee in the previous regulation, it would be consistent to decide that it should not be considered an asset for purposes of the transfer rules.

Commissioner Downey questioned whether it was necessary since the regulations were aimed at different issues.

Commissioner Swanson noted that it involved attributing to specific contributors.

Commissioner Downey stated that this regulation involved educating the public whereas the other regulation involved net debt, and that the issues were different.

Ms. Wardlow stated that the purpose of the net debt regulation was to define what the cash assets were. That would have required that the committee sell the assets to raise the money so that it could be included in the formula for how much money was available for debt repayment. It was determined that it would probably be more difficult than assigning a value for purposes of deciding how much should be transferred and attributed. Regulation 18536 would not require that the asset be sold.

Chairman Getman noted that the Commission decided not to require valuing an asset in the net debt regulation because the assets were not worth enough money to make the process worthwhile. She believed that the same logic could be applied in this regulation.

Ms. Menchaca pointed out that, if an asset is *de minimis*, it may not be necessary. However, the asset could be significant.

Commissioner Swanson stated that the asset does not concern her as much as the attribution to a specific contributor. She asked how a campaign could determine how to attribute an asset with particular contributor(s), and what measurement would be used.

Ms. Wardlow explained that once the value of the asset had been ascertained, the candidate would use the same process that is used for attributing cash. The most recent contributors would be attributed for the amount they contributed until the amount of the value of the asset had been reached.

Chairman Getman asked how a school board member who decided to run for a different office would transfer assets to the new campaign (ie. a desk from the school board campaign being used for the new campaign).

Ms. Wardlow responded that it would be required to be reported technically, but that she believed that few candidates actually reported it. She explained that the forms do not accommodate that type of disclosure, and that candidates probably carry those assets over to the new campaign without even thinking that assets are being transferred and need to be accounted for.

Chairman Getman stated that if assets must be transferred in this regulation, those assets would need to be transferred in other regulations and enforcement division would have to pursue cases where the transferred assets were not reported.

Mr. Russo responded that this issue arises when, after losing a campaign, disposition of assets becomes a concern. He suspected that those assets end up in the candidate's office or home, but that it is not an issue that enforcement staff strongly pursues. If the Commission were to decide that those types of things are assets that can be transferred, then enforcement staff would pursue them in a "personal use" context because the Commission would be identifying those assets as items that need to be tracked.

Ms. Menchaca stated that the Commission was also considering terminating committees, which would include dealing with those assets. Additionally, the Commission was considering eliminating redesignation, so, at some point, assets will have to be transferred or disposed of in some manner. This regulation may be useful to help people understand their responsibilities with regard to assets.

Chairman Getman noted that the assets are not considered part of the net debt calculation, so the Commission has essentially made the opposite decision.

Commissioner Downey stated that the decision to exclude the assets from the net debt calculation was made because the assets were not liquid items. He did not think the same logic applied in this regulation because excluding the assets in this regulation could create a loophole. If a donor contributed money for the purpose of buying computers and the computers are transferred to the new committee there would be no attribution under subsection (b).

Chairman Getman pointed out that those computers would have been used and are not particularly valuable at that point.

Commissioner Swanson pointed out that committees get used equipment more often than not. She suggested that the language in proposed regulation 18536(b) be changed to read, "Transferred campaign funds shall include any inventory equipment or other assets to be transferred to the receiving committee at the time of the transfer.

Chairman Getman stated that Proposition 34 requires that transferred items must be attributed.

Commissioner Swanson suggested deleting subparagraph (b).

Chairman Getman agreed.

Mr. Davidian commented that most of the equipment is leased or borrowed and is returned to the owners the day after the election.

Chairman Getman stated that there are bigger things to worry about under Proposition 34 and that the Commission needed to be concerned about bigger issues than used desks and computers.

Ms. Wardlow commented that the current "personal use" rules prohibit committees from buying many luxury items such as land or automobiles, so she did not believe large assets were involved.

There was no objection from the Commission to deleting subparagraph (b).

Chairman Getman moved that the proposed new regulation 18536 be adopted without subparagraph (b).

Commissioner Knox seconded the motion.

Commissioners Downey, Swanson, Knox and Chairman Getman voted "aye." The motion carried by a vote of 4-0.

Ms. Wardlow explained that a question had arisen regarding whether the transfer and attribution process is applicable to the other special reports that candidates are required to file, such as the \$5,000 and \$1,000 reports, late contribution reports and late expenditure reports. Staff recommended that the Commission not require that additional reporting.

There was no objection to the staff recommendation.

Item #12. Proposition 34 Regulations: Adoption of Regulation 18540, Allocation of Expenditures Subject to Voluntary Expenditure Ceilings (Section 85400).

Mr. Woodlock presented proposed regulation 18540 for adoption by the Commission. The regulation implements § 85400, enacted by Proposition 34, which established voluntary expenditure ceilings for campaigns for elective state offices. The ceilings are set separately for different elections, including primary, special primary, special elections, special runoff elections and general elections.

Mr. Woodlock reviewed the Commission's actions in August 2001 regarding this regulation. He explained that subdivision (a) includes the actual rules for allocating expenditures, (b) references the reporting regulation, (c) expressly treats in-kind contributions, and (d) is a list of common campaign expenditures that would not be subject to the ceiling.

Mr. Woodlock presented three decision points for subparagraph (a). Decision 3 includes language that would provide a "fail-safe" rule in case the provisions of subparagraphs (a)(1) through (7) resulted in a clear misallocation of an expenditure. Staff provided two options addressing this issue.

Mr. Woodlock explained that decision 1 deals with expenditures on professional services in subparagraph (a)(4). The general rule provides that professional services must be allocated to the election immediately following the date on which the expenditure for professional services is made. Decision 1 provides that if the contract for professional services specifically allocates different services for various elections, the contract will control the allocation, but this might give candidates the opportunity to write contracts for strategic purposes. Staff had no recommendation on this issue.

Chairman Getman stated that contracts are likely to be written contemplating services over the length of the primary and general campaigns, and allocate the expenditures within the contract. If the Commission did not approve decision 1, a consultant contract would be allocated incorrectly.

Mr. Woodlock agreed, but noted the concern that, with the new rule, the contracts would be written strategically to suit strategic goals.

Chairman Getman noted that if the rule is not included in the regulation, the Commission would know it was wrong. She believed that the language in decision 1 was useful.

Commissioners Downey, Swanson and Knox agreed that the language was not problematic.

Mr. Woodlock stated that subdivision (a)(7) includes a rule that was originally written as a special purpose rule for broadcast advertisements. However, staff moved the rule from (a)(2) to (a)(7) in order to make it a generalized rule for all refunds in decision 2.

The Commission had no objection to decision 2.

Mr. Woodlock explained that decision 3 option 1 proposes a general rule broadly written to answer the concern that a misallocation could occur through use of one of the first 7 allocation options. Option 2 provides a more specific rule for the same purpose, but, because it is more specific it will not always work.

Mr. Woodlock explained that, under option 1, the Commission would need to decide whether the rule should be mandatory or permissive. It will be difficult for the candidate to know which election will be primarily affected by the expenditure, so making the rule mandatory could result in reporting errors. If a candidate had a lot of money in the campaign account and knew that the primary election would be successful, but that the general election was going to be difficult to win, the candidate may decide to take out a very large advertisement at the end of the primary aimed against the general election opponent.

Chairman Getman stated that she thought the regulation was aimed at campaign expenditures made during the primary election to pay for a service which will be provided during the general election. The general rule would require that the expenditure be allocated to the primary election but that the allocation would be wrong. The scenario presented by Mr. Woodlock would be very difficult for enforcement staff because it would be difficult to determine which election the expenditure would influence.

Mr. Woodlock agreed. The first scenario presented by Chairman Getman would be subject to the general rule. However, the "fail-safe" rule is written to address expenditures operating primarily to influence a particular election and would involve subjectivity when assigning the allocation. The rule is not meant for close cases because enforcement staff should not have to adjudicate those close cases.

Commissioner Knox noted that Mr. Woodlock's scenario could become more complicated if the advertisement did not mention the opponent in the other party but identified issues instead. He suggested that enforcement would have to handle cases with a political sensitivity that he was not sure the Commission could or should foster because it would be so highly subjective.

Mr. Woodlock agreed, but noted that staff could stay away from those close cases.

Commissioner Knox stated that the Commission cannot ignore complaints.

Mr. Woodlock pointed out that the rule could be permissive instead of mandatory.

Chairman Getman suggested that the first sentence in decision 3 option 2 be used as the general rule in decision 3 option 1. The Commission would need to decide whether to make it mandatory or permissive and then use similar language when it is being used for 2 or more elections.

Mr. Woodlock recognized that option 1 introduced a high degree of subjectivity. He agreed that he could adapt the language of option 2 to option 1 to eliminate most of the subjectivity of option 1.

Mr. Russo agreed that the language would be better, but that it ultimately was a policy call. A clear rule without subjectivity was the simplest for enforcement staff to work with. He agreed that the language of proposed option 1 was problematic. Option 2 was narrower, but still allowed for some subjectivity. Staff suggested other restrictions requiring that items purchased indicated which election the items were purchased for.

Commissioner Knox suggested that the presumption could be that the expenditures would be attributed to the election next following the date on which the goods and services are delivered unless there is some clear indication to the contrary.

Chairman Getman pointed out that paragraph 7 has a default rule.

Mr. Woodlock explained that Commissioner Knox's proposal would add a codicil to the default rule in paragraph 7. If further provisions are added, he noted, it would make enforcement easier, but would also mean that not all of the misallocations would be captured. Advertisements purchased during the primary election but for the general election would automatically be allocated to the primary election unless the item or invoice specifically noted that the item was for the general election.

Chairman Getman noted that item 8 could then be deleted.

Chairman Getman stated that she no longer supported a "fail-safe" rule because it would place the enforcement staff in the position of trying to second-guess strategy. She preferred Commissioner Knox's version of paragraph 7.

Mr. Russo stated that Commissioner Knox's suggestion was much more workable for enforcement staff.

Ms. Menchaca suggested that the language suggested by Commissioner Knox, "unless there is a clear indication to the contrary," be placed at the beginning of subdivision 7.

Commissioner Knox agreed.

Ms. Wardlow pointed out that the definition of expenditure in the statute provides that an expenditure is made on the earlier of (1) when the payment was made, or (2) when the goods or services were received. Therefore, she did not know that the "goods or services" language proposed by Commissioner Knox was necessary.

Commissioner Downey stated that the Commission was proposing the later of the two dates, not the earlier.

Commissioner Knox agreed.

Chairman Getman restated that subparagraph (7) would be reworded to read, "Unless there is a clear indication to the contrary, campaign expenditures not described in subdivisions (a)(1)

through (6) of this regulation shall be allocated to the next election following the date on which the goods or services are delivered."

Commissioner Knox agreed, noting that he had hoped that a non-exclusive list of what constitutes "clear indications to the contrary" could be crafted.

Mr. Woodlock responded that when working with campaign expenditures, there is an infinite variety of expenditures and that he has shied away from specific rules intended to govern all cases.

Commissioner Knox suggested that subparagraph (8) options 1 and 2 could make a good starting point for the list, and asked whether a campaign manager would get around it.

Mr. Woodlock responded that the vendor may not even know or care about the election information, and would escape the rule.

Commissioner Swanson stated that the campaign may not even know, because they may order a quantity of an item not knowing how it will be used throughout the life of the campaign.

Commissioner Knox stated that he could do without the list, leaving it up to the campaign to have a good reason to attribute an expenditure to the next campaign.

Mr. Woodlock agreed, noting that it made it possible for a campaign to avoid a misallocation.

Chairman Getman clarified that subparagraphs (1) through (6) would be specific rules for specific types of expenditures, and misallocations under those rules would be misallocations.

Mr. Woodlock explained that there may be a problem with this because subdivision (7) was originally designed to deal with campaign expenditures not earlier described.

Commissioner Knox responded that subdivision (7) becomes a "catch-all" provision for anything not described in (a)(1) through (6).

Chairman Getman noted that subdivisions (a)(1) through (6) contain clear rules that will work in most cases.

Mr. Woodlock noted that the "fail-safe" rule would not apply to subparagraph (a)(2).

Chairman Getman agreed, noting that the rule works in that example to prevent a misallocation.

Commissioner Knox noted that subparagraphs (2) and (7) would result in the same allocation in that case.

Chairman Getman explained that the Commission had suggested the idea of a "fail-safe" rule but had reconsidered and decided that it was not a good idea.

Chairman Getman moved that proposed regulation 18540 be adopted, with item (8) being deleted and item (7) being changed to read, "Unless there is a clear indication to the contrary, campaign expenditures not described in subdivisions (a)(1) through (a)(6) of this regulation shall be allocated to the next election following the dates on which the goods or services are delivered.

Refunds of any expenditure on goods or services not provided to or used by the campaign shall be credited to the election for which the expenditure would otherwise have been allocated," and subdivision 9 becoming subdivision 8.

Commissioner Knox seconded the motion.

Diane Fishburn, from Olson Hagel, clarified that the limit being discussed is the voluntary expenditure limit, and that an enforcement action would be for violating that limit, and not whether an expenditure was allocated correctly.

Mr. Russo responded that there could be a record-keeping violation if the expenditure was allocated incorrectly, but did not think it likely that it would be the basis of an enforcement action.

Ms. Fishburn noted that the voluntary expenditure limit should be encouraged by the Commission, and that enforcement action should only be taken if the limit is violated.

Chairman Getman explained that the regulation deals only with § 85400 and is not a general reporting rule.

Mr. Russo explained that the situation would arise when there was a dispute over whether expenditure limits were violated.

Chairman Getman suggested that staff should explore whether the regulation is inconsistent with the general reporting rules.

Mr. Woodlock noted that the opening language reading, "For purposes of § 85400..." was written to make the regulation narrow. He agreed that there should not be two separate sets of reporting systems.

Ms. Wardlow stated that staff would use the regulation to advise candidates to calculate the figure required on the summary page.

Chairman Getman agreed, noting that the expenditures need to be allocated only when the candidate has accepted the voluntary expenditure limits.

Commissioners Downey, Swanson, Knox and Chairman Getman voted "aye." The motion carried by a vote of 4-0.

Item #13. Campaign Disclosure Forms --Form 460 Instructions; Ratification of Fact Sheet 34-01.

Ms. Menchaca noted that page 2, item 2 of the proposed Fact Sheet would require a correction as a result of the Commission's earlier discussion. She suggested deletion of the language, "using Form E497."

Ms. Wardlow pointed out two references to regulation 18421.4 that no longer apply because the regulation does not exist. Those references should be deleted. She noted that she would remove references to any regulations that do not exist.

Chairman Getman agreed.

Chairman Getman moved adoption of Fact Sheet 34-01 with the deletion of any references to regulations that do not exist.

Commissioner Swanson seconded the motion.

There being no objection, the motion carried.

The Commission adjourned for a break at 3:29 p.m.

The Commission reconvened at 3:47 p.m.

Item #6. Conflict of Interest Regulations Improvement Project - Status Report and Pre-notice Discussion of Proposed Amendments to Regulations 18232, 18705.5, and 18708.

Chairman Getman thanked staff for their work on the Phase 2 project. She noted that feedback from the County Counsel's Association during a recent conference indicated that the project made it much easier for them to apply the conflict of interest rules.

Commission Counsel Bill Williams presented a status report regarding the impact of the Phase 2 regulatory changes. He noted that staff received input from the regulated community regarding the project, and was presenting 3 clarifying amendments for pre-notice discussion and 2 issues for policy discussion.

Mr. Williams explained that regulation 18704.2 determines whether an interest in real property is directly or indirectly affected by a governmental decision. He asked that the Commission discuss the application of that 500' rule.

Mr. Williams explained that a decision is considered directly affected if the property that is subject to the decision is within 500' of the official's property. The Commission was asked to decide whether the application of that rule was limited to those delineated decisions in the regulation subparagraphs (a)(1) through (a)(6). A literal reading would support a narrow construction of the regulation, however, that means a number of substantive discretionary decisions affecting real property would not be subject to the 500' rule. Staff requested policy guidance as to whether the regulation should be narrowly construed, or to make the interpretation broader by indicating that the items in the subdivision be considered merely illustrative.

Chairman Getman stated that she thought the Commission had enacted a general 500' rule and that the examples were already meant to be illustrative.

Mr. Williams stated that staff has applied it as illustrative, but that the language of the regulation does not provide that it be considered illustrative.

There was no objection to authorizing staff to work on correcting the regulation.

Michael Martello, City Attorney of Mountain View and representative from the League of California Cities, concurred with the Commission's recommendation. He noted that general plans are not mentioned in the regulation, and that there are a lot of levels of land use decisions that should be addressed. Clarifying language could be included to correct those issues.

Chairman Getman stated that the County Counsels were also concerned about how to apply the rules in the context of general plan amendments.

Mr. Martello explained that a general plan amendment can be done on a small scale and can be very similar to a zoning decision. The City Attorneys FPPC Committee supported the broader view of the regulation.

Mr. Williams pointed out that regulation 18704.2 does not currently address general plan amendments in terms of direct or indirect effect, and may need to be explored further.

In response to a question, Mr. Wallace stated that staff recommended that the regulatory calendar for next year include general plan land use issues in the conflict of interest context.

There was no objection from the Commission to the staff recommendation.

Mr. Williams explained that regulation 18705.1 sets for benchmarks for various materiality standards to be applied to indirectly affected business interests. One of those benchmarks is an actual listing on the Securities Exchanges. A problem with these arises with the benchmarks that determine whether a business meets the criteria for listing on an exchange, because the language is difficult to understand. Consequently, the regulated community is having difficulty using those benchmarks to determine which materiality standard to use. He asked the Commission whether they wished to direct staff to develop alternative, more usable benchmarks. He added that the purpose was to provide a flexible, working benchmark for various sized businesses that would not have to be changed every couple of years.

Mr. Williams stated that staff is exploring alternative benchmarks, and has begun discussions with auditors to develop something easier to use, but has not as yet put together anything.

Mr. Wallace noted that interested persons have suggested one or two specific criteria from the multiple listing criteria that staff believed were relevant. He asked the Commission whether they wanted staff to continue to pursue.

There was no objection from the Commission to pursuing the issue.

Mr. Williams presented clarifying amendments for prenotice discussion to correct fairly minor changes to the regulations.

In response to a question, Mr. Wallace stated that he did not know how the 60-day limit in regulation 18232(c) was determined, but that staff was not requesting modification of that language. There has been no public feedback to the regulation indicating that it did not work.

Commissioner Swanson requested that staff explore a possible 90-day limit.

Commissioner Downey moved that the Commission approve the proposed amendments to be noticed for adoption.

Commissioner Swanson seconded the motion.

There being no objection, the motion carried.

Mr. Martello stated that, once a conflict existed under 18702.1, the regulation deals with how an official deals with the conflict during a meeting. The last paragraph of that regulation indicates that an official may not be present nor obtain or review a copy of nonpublic information for a closed session item the official is excluded from participating in due to a conflict of interest. The unintended consequence of this regulation is that the council members get their closed session packets before they know that they have a conflict, placing them in violation of the regulation. He suggested that the language be changed to indicate that the official is not entitled to attend the closed session meeting nor to receive the information instead of "may not" receive the information.

Chairman Getman suggested that the wording could be changed to "knowingly received."

Mr. Wallace explained that the Commission would have to set up a prenotice discussion and would work with the League of California Cities to deal with the issue.

There was no objection from the Commission.

Ms. Menchaca stated that the Commission could do a prenotice discussion or just consider it once for adoption.

Chairman Getman suggested that the Commission discuss the issue for adoption purposes.

Ms. Menchaca noted that if there were any problems at the adoption discussion the Commission could postpone the adoption until those issues were addressed.

There was no objection to discussing the issue for adoption purposes when it is brought back to the Commission.

Item #7. Conflict of Interest Regulations Improvement Project - Status Report and Pre-notice Discussion of "Reasonably Foreseeable" Material Financial Effect Standard (Section 87103/Proposed Regulation 18706.)

Mr. Wallace explained that foreseeability is the sixth step of the standard 8-step conflict of interest analysis. Foreseeability was not defined by regulation but was controlled by the Commission's *Thorner* opinion. Regulation 18706 codified that opinion in 1998. Since then, real estate professionals have suggested that *Thorner* did not provide sufficient guidance in determining when a financial effect is considered reasonably foreseeable. In December 2000, staff issued the *Olson* advice letter setting out new standards for applying the foreseeability test in the context of development decisions for those cases where the public official was a real estate professional. Those new standards were developed working with the original *Thorner* opinion. Public reaction to those standards has been overall positive, but Mr. Wallace suggested that the public would like to see more clarity. Staff requested that the *Olson* factors be noticed in regulatory form so that people know about the new factors.

Chairman Getman asked whether this should be limited to licensed real estate agents and brokers. She noted that the *Thorner* opinion dealt with many different types of businesses and that other businesses have the same issues as the real estate businesses with regard to land use/redevelopment decisions.

Mr. Wallace agreed, but noted that staff was reluctant to write the regulation too broadly. He suggested that the regulation could be limited to real estate professionals, or to real estate development decisions or, if the Commission wanted, drafted without limit for a broader interpretation.

In response to a question, Mr. Wallace stated that the "market share" and "competition" factors are somewhat overlapping and that one of them could be deleted without harming the regulation.

Mr. Martello commented that the cities supported the direction staff was taking. He noted that the real estate professionals often feel that they are being singled out in the regulations, but the public also singles them out because they often assume that the real estate professionals vote their self-interest when they vote for development. Special rules are necessary.

In response to a question, Mr. Wallace stated that it would be better to go forward with the regulation now, rather than waiting until the general plan issues can be dealt with.

Ms. Menchaca stated that subdivision (b)'s limitation to real estate professionals could be perceived by the public as a loophole for real estate professionals.

Chairman Getman agreed that the Commission should be cautious, and suggested that staff provide more options for the Commission to consider, including giving the codification to any business impacted by a real estate development issue.

Commissioner Downey noted that there was a typographical error and that the word "of" should be added to proposed regulation 18706(c) following the word "Possession."

The Commission directed staff to go forward with the regulation with a few more options, without objection.

Items #15, #16, #17, #18, and #19.

The following items were placed on the consent calendar:

Item #15. *In the Matter of Fernando Vellanoweth*, FPPC No. 00/851.

(35 counts.)

Item #16. *In the Matter of Joseph Gray Davis, Californians for Gray Davis, and Steven Gourley, Treasurer*, FPPC No. 2000/56. (22 counts.)

Item #17. *In the Matter of Support Our Schools and Fredda Miller*, FPPC No. 97/494.

(4 counts.)

Item #18. *In the Matter of Excellence in Student Achievement*, FPPC No. 98/265.

(4 counts.)

Item #19. *In the Matter of Excellence in Student Achievement*, FPPC No. 2000/265.

(1 count.)

Commissioner Knox abstained from participating on item #15.

Chairman Getman moved that items #15 through #19 be approved, with Commissioner Knox abstaining from item #15.

There being no objection, the motion carried.

Item #20. Executive Director's Report.

Executive Director Mark Krausse presented the FPPC Statement of Incompatible Activities for the Commission's consideration.

Chairman Getman noted that the language in item (c)(3) referring to a member or beneficiaries having confidential investment information probably did not belong in the document because the Commission does not have members or beneficiaries. She suggested that the language in parenthesis in (c)(3) be deleted.

Staff Counsel Natalie Bocanegra stated that the language was taken from the CalPERS Statement of Incompatibility. She noted that there may be instances of contracting at the FPPC where the prohibitions might be applicable, but agreed that subsection (c)(3) may not be one of those instances.

In response to a question, Ms. Bocanegra stated that subsection (d) was provided to prevent any possible improper financial ties between Commission employees and persons who would be subject to provisions of the Act. She explained that it prohibited the making of gifts to address direct relationships. She pointed out that the current Statement of Incompatible Activities references transmitting a gift to the types of individuals listed in the Statement of Incompatible Activities.

Mr. Krausse stated that the prohibition addressed the appearance of impropriety.

Chairman Getman noted that the prohibition would prevent an FPPC employee from giving a \$15 box of candy to another state employee. She agreed that staff should not accept gifts from people that the Commission regulates, but saw no reason to prohibit giving gifts. She suggested that the language be changed to read, "...shall not knowingly accept or solicit any gift or loan..."

Commissioner Downey stated that there may be an appearance of impropriety if an employee made a substantial gift to a legislator or lobbyist, but did not think it was necessary to prohibit giving gifts to the many people listed in the proposed Statement of Incompatible Activities.

Mr. Krausse stated that there was an exception for some circumstances, but would not encompass many relationships.

Commissioner Swanson noted that subsection (B)(iv) allows an exchange of gifts, but questioned how it could be enforced.

Ms. Wardlow pointed out that it is only applicable to birthdays, holidays, and other similar occasions. She suggested that the Commission may want to add a provision regarding exchanges among staff, because the way it is currently written a staff member could not give a wedding gift or send flowers to a funeral for a staff member.

Ms. Menchaca suggested that the \$10 limit could be increased.

Ms. Wardlow suggested that the term "agency official" in the first paragraph be deleted.

Chairman Getman suggested deleting the "...or make..." language on page 4 item (4)(A) and adding "except that this prohibition shall not apply to gifts made to other employees of this agency" after the words "...87200 of the Act."

Chairman Getman also suggested that a sentence in paragraph (F) on page 6 be changed to read, "Exceptions to the above restrictions on political activities may be granted..." and the language on page 2, item (3) inside the parenthesis be deleted.

Ms. Bocanegra reconfirmed the 4 changes suggested by the Chairman, and stated that once the Commission approves the document, it would be submitted to the Department of Personnel Administration for formal approval.

Chairman Getman moved that the Statement of Incompatible Activities be approved.

Commissioner Knox seconded the motion.

There being no objection, the motion carried.

Item #21. Legislative Report

Mr. Krausse stated that there was nothing new to report.

Chairman Getman directed that the Legislative Report be taken under advisement.

Item #22. Litigation Report

Chairman Getman directed that the Litigation Report be taken under advisement.

The meeting adjourned at 4:38 p.m.

Dated: October 11, 2001

Respectfully submitted,

Sandra A. Johnson
Executive Secretary

Approved by:

Chairman Getman